83-2137

No. 84-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL REALTY CORPORATION,

Petitioner,

v.

HOME FEDERAL SAVINGS AND LOAN, ASSOCIATION OF HOLLYWOOD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

SYDNOR THOMPSON*
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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the North Carolina Court of Appeals deprived the Petitioner of its right to an opportunity to be heard, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution, when it remanded Petitioner's action to the trial court for further proceedings on the existing record instead of ordering a new trial.

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OPINIONS BELOW

The North Carolina Supreme Court's Order Denying Petitioner's Petition for Discretionary Review is reported without opinion at 310 N.C. 624, ___ S.E.2d _____ (1984). A copy of said Order of the North Carolina Supreme Court is attached hereto. (See Appendix 63.)

The Opinion of the North Carolina Court of Appeals on which this Petition is based is reported at 65 N.C. App. 242, 310 S.E.2d 33 (1983). A copy of said Opinion of the North Carolina Court of Appeals is attached hereto. (See Appendix 34.)

JURISDICTIONAL GROUNDS

The date and time of entry of the judgment of the North Carolina Court of Appeals sought to be reviewed is December 6, 1983. A Petition for Rehearing was

denied February 7, 1984. A Petition for Discretionary Review by the Supreme Court of North Carolina was denied April 3, 1984.[1] This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. §1257(3)..

Petitioner prays that a writ of certiorari issue to review the judgment below upon the ground that the decision of the North Carolina Court of Appeals remanding the case to the trial court without ordering a new trial conflicts with the law of the State of North Carolina as set forth in Farmers Bank v. Michael T. Brown Distributors, Inc., 307

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[1] The denial by the North Carolina Supreme Court of Petitioner's petition for discretionary review thus resulted in the full effectiveness and finality of the North Carolina Court of Appeals' decision, no further review thereof being possible in the North Carolina courts.

N.C. 342, 298 S.E.2d 357 (1983), and has thereby deprived Petitioner of its right to an opportunity for a full hearing, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution.

STATUTES INVOLVED

28 U.S.C. §1257 provides, in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari,.....where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

United States Constitution, Amendment XIV provides, in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 20, 1976, Chemical Realty Corporation[2] (hereinafter "Chemical") instituted this action against Home Federal Savings & Loan Association of Hollywood (hereinafter "Home Federal") in Buncombe County Superior Court, North Carolina, and

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[2] On July 28, 1983, Chemical Realty Corporation filed with the Department of State of New York a Certificate of Amendment of its Certificate of Incorporation which charged the name of the corporation to Chemical Real Holdings, Inc.

sought to recover $5,694,951.56 in money damages for, inter alia, Home Federal's breach of a take-out agreement in connection with a permanent loan commitment for the Landmark Hotel (now Inn on the Plaza, but hereinafter "Landmark") in Asheville, North Carolina. Home Federal moved to dismiss the action for, inter alia, lack of personal jurisdiction, and the trial court denied the motion. Thereafter, Home Federal appealed that decision to the North Carolina Court of Appeals, which unanimously affirmed the trial court's order. Home Federal then raised the jurisdictional question before both the Supreme Court of North Carolina and the United States Supreme Court, and both courts dismissed the appeals.

Judgment of the Trial Court

The case was tried before The Honorable C. Walter Allen, sitting without a jury, in Buncombe County Superior Court from September 22, 1980 through and including October 9, 1980. Closing arguments in the case were deferred pending the preparation of the trial transcript by the court reporter. Pursuant to Judge Allen's instructions, both parties filed proposed findings of fact, conclusions of law and judgments in November, 1981. Judge Allen heard closing arguments in the case on November 23, 1981.

Pursuant to Rule 52 of the North Carolina Rules of Civil Procedure, Judge Allen made certain findings of fact and conclusions of law and entered judgment for Home Federal on June 29, 1982.

In the complaint, Chemical had alleged that Home Federal had agreed to a "take-out" or purchase of Chemical's construction loan to Landmark and also alleged that it had made the construction loan to Landmark in reliance on Home Federal's promise to provide the long-term financing for the hotel.

Chemical alleged that Home Federal had a contractual duty to fund the long-term loan because (1) Chemical was the third-party beneficiary of the permanent loan commitment which Home Federal had issued to Landmark and (2) Home Federal had signed and sent a letter to Chemical in which Home Federal agreed to purchase the construction loan note and to accept an assignment of the deed of trust held by Chemical, thus creating

a direct contract between Chemical and Home Federal.

In its answer, Home Federal denied that Chemical was the third-party beneficiary of the permanent loan commitment and denied that its letter to Chemical constituted the basis for a contract.

In the findings of fact and conclusions of law contained in the trial court's Judgment, the trial court failed to make any finding or conclusion on the third-party beneficiary issue or on the contract issue. On July 7, 1982, Chemical gave notice of appeal to the North Carolina Court of Appeals, contending that the trial court erred in failing to make findings of fact and conclusions of law on these central issues and citing certain other errors

of the trial court. On December 3, 1982, the record on appeal in the case was docketed with the North Carolina Court of Appeals.

Decision of the North Carolina Court of Appeals

On December 6, 1983, the court of appeals filed its decision in this matter, and that decision was certified to Buncombe County Superior Court on December 27, 1983. The court of appeals reversed the Judgment of the trial court on the ground that the trial court had failed to make findings of fact and conclusions of law on the issues of third-party beneficiary and the contractual relationship between Chemical and Home Federal. However, the court of appeals did not order a new trial of the

matter but remanded it to the trial court on the existing record "for further proceedings consistent with this opinion." 65 N.C. at 251, 310 S.E.2d at ____.

Petition for Rehearing

On January 11, 1984, Chemical filed a petition under North Carolina Appellate Rule 31 for rehearing of that portion of the Judgment of the court of appeals denying a new trial. In its petition, Chemical argued that the failure of the Court of Appeals to order a new trial was contrary to North Carolina law, including the holding of the North Carolina Supreme Court in Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983), and by implication, that the failure of the court of appeals

to order a new trial was a denial of Chemical's due process rights.

By order entered February 7, 1984, the North Carolina Court of Appeals denied Chemical's petition for rehearing and certified the Order to the Clerk of Superior Court in Buncombe County. (Appendix 61.)

Petition for Discretionary Review to the Supreme Court of North Carolina

On February 22, 1984, Chemical filed a petition with the Supreme Court of North Carolina for discretionary review under North Carolina General Statute §7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure. In its petition, Chemical did not contest that part of the appellate court's ruling which reversed the Judgment of the trial

court. However, Chemical again contended that the ruling of the court of appeals remanding the case on the existing record without ordering a new trial was contrary to North Carolina law and by implication, the United States Constitution. In addition, Chemical requested the North Carolina Supreme Court to issue an Order certifying the case for review on the grounds that the subject matter of the appeal had significant public interest and involved legal principles of major significance to the jurisprudence of the State of North Carolina and presented issues which had not been decided by the courts in North Carolina.

On April 3, 1984, the supreme court entered an Order denying Chemical's Petition for Discretionary Review. That

Order was certified to the North Carolina Court of Appeals by the Clerk of the Supreme Court of North Carolina on April 5, 1984, and on April 9, 1984 the Clerk of the North Carolina Court of Appeals certified the denial of the Petition for Discretionary Review to the Clerk of Superior Court of Buncombe County. (Appendix 65.)

REASONS FOR GRANTING THE WRIT

The gravamen of Chemical's complaint was that a contractual relationship existed between it and Home Federal which required Home Federal to purchase the construction loan note and accept an assignment of the deed of trust held by Chemical for the Landmark Hotel. In the alternative, Chemical argued that it was a third-party beneficiary of Home

Federal's permanent loan commitment to Landmark. Since the Judgment of the trial court was devoid of any findings of fact or conclusions of law with respect to these two issues, the North Carolina court of appeals correctly reversed the decision. However, the decision of the Court of Appeals remanding the case to the trial court without ordering a new trial conflicts with the law of the State of North Carolina as set forth in Farmers Bank, supra, and has thereby deprived Chemical of its right to an opportunity for a full hearing, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution.

In Farmers Bank, as in this action, the case was tried without a jury. In both cases the trial courts made certain

findings of fact and conclusions of law on some of the issues in the cases but failed to make all the necessary findings arising under the pleadings and the evidence. The North Carolina Supreme Court in Farmers Bank vacated the order of the trial court and ordered a new "hearing" so that the court could make adequate and appropriate findings of fact and conclusions of law. It is the contention of Chemical that a new "hearing" is synonymous with a new trial since the trial court's decision in the Farmers Bank case was made as the result of an actual trial.

There are other North Carolina decisions which also support Chemical's argument for a new trial. See O'Grady v. First National Bank, 296 N.C. 212, 250 S.E.2d 587 (1978); Baysdon v.

Nationwide Mutual Fire Insurance Co., 259 N.C. 181, 130 S.E.2d 311 (1963); Conrad v. Jones, 31 N.C. App. 75, 228 S.E.2d 618 (1976).

The instant case is analogous to the Conrad case in which the plaintiff sought a mandatory injunction ordering the defendants to disconnect a sewer line constructed by them from an eight inch line allegedly owned by one of the plaintiffs and a permanent injunction restraining the defendants from reconnecting their sewer line to the plaintiff's sewer line. The action was tried without a jury, and the court made findings of fact and concluded that the plaintiffs were not entitled to equitable relief.

On appeal by the plaintiffs, the North Carolina Court of Appeals reversed

the trial court, vacated the judgment and ordered a new trial because the trial court failed to make any findings with respect to what interest, if any, the plaintiffs had in the sewer line, and thus whether they were entitled to equitable relief. 31 N.C. App. at 79, 228 S.E.2d at 620. As in Conrad, until the trial court has determined the fundamental question of whether a contract exists between Chemical and Home Federal, that court cannot determine the other issues presented in the case. Nevertheless it did undertake to rule on many other questions. Since the new judgment may thus be tainted by the old judgment, Chemical is entitled to a new trial. Accord, Quick v. Quick, 305 N.C. 446, 290

S.E.2d 653 (1982); Rock v. Ballou, 286 N.C. 99, 209 S.E.2d 476 (1974).

The effect of the decision of the North Carolina Court of Appeals is to deprive Chemical of property (a money judgment) without affording it an opportunity to be fully heard in violation of Chemical's due process rights. Although the fourteenth amendment does not assure litigants immunity from all judicial error, "if the error is gross and obvious, comming close to the boundary of arbitrary action, there may be a violation of the guaranty." 16 Am. Jur. 2d, Constitutional Law § 819 at 99. Under this Court's holding in Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), Chemical is entitled to a new trial.

In Brinkerhoff-Faris, the plaintiff as trustee for its stockholders, filed suit in a Missouri state court seeking to enjoin a county treasurer from collecting part of the taxes assessed against the bank's stockholders on the shares of its stock. Plaintiff alleged that the assessor had intentionally and systematically discriminated against the stockholders by assessing bank stock at full value while omitting to assess certain classes of property and assessing other classes of property at 75% or less of their value. The trial court refused the injunction without opinion or findings of fact.

On appeal, the Supreme Court of Missouri affirmed the trial court and held that the plaintiff should have filed its complaint before the state tax

commission at any time before the tax books were delivered so that the commission could have granted a hearing and heard evidence with respect to the valuations complained of. The court further stated that if the commission found that the charges contained in the complaint were true, it could have ordered the valuations lowered. In so ruling, the Supreme Court of Missouri expressly overruled its decision six years before that the commission lacked the authority to provide the type of relief requested by the plaintiff.

The plaintiff filed a petition for rehearing on the ground that in denying relief because of the newly found powers of the commission, the court had violated the due process clause of the fourteenth

amendment. The petition for rehearing was denied, and thereafter the plaintiff petitioned this Court for certiorari.

The United States Supreme Court granted the petition for certiorari and reversed the state court. The Supreme Court found the Missouri Supreme Court had denied plaintiff's due process rights because the effect of its judgment was to deprive the plaintiff of property without affording it an opportunity to be heard in its defense.

In reaching its conclusion that the Missouri State Supreme Court had violated the plaintiff's due process rights, the United States Supreme Court examined the concept of due process violations committed by the judiciary. It stated:

> "The federal guaranty of due process extends to state action

through its judicial, as well as through its legislative, executive, or administrative, branch of government.

It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.

...

But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all

> existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Id. at 680-682; 50 S.Ct. at 4.

It is clear that the trial court misperceived this case from the outset in that it failed to make findings of fact and conclusions of law on the fundamental issues in the case. Unless Chemical is awarded a new trial, it will be deprived of an opportunity to an impartial and full hearing on its case against Home Federal.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted, this _____ day of June, 1984.

Sydnor Thompson

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APPENDIX

APPENDIX:

Appendix 1

STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 76 CVS 2491
CHEMICAL REALTY CORPORATION, Plaintiff vs. HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD, Defendant.	JUDGMENT (Filed June 29, 1982)

THIS CAUSE coming on to be heard without a jury before the undersigned Judge Presiding at the civil term of Superior Court of Buncombe County beginning on September 22, 1980; and based upon the testimony of the witnesses at the trial of this action, the depositions or portions of the depositions

introduced at the trial, the exhibits of the parties introduced at the trial and the pleadings and the stipulations between the parties, the Court makes the following

FINDINGS OF FACT:

1. The Plaintiff, Chemical Realty Corporation, (hereinafter called Chemical) is a New York Corporation with its principal office in New York, New York, and was at all times relevant to this action engaged in the business of making construction and other types of real estate loans.

2. Home Federal Savings and Loan Association (hereinafter called Home Federal) is a corporation with its principal office in Hollywood, Florida, having originally been chartered as a

Federal Savings and Loan Association under the acts of Congress. On June 2, 1980, Home Federal became chartered as a State Savings and Loan Association regulated under the laws of the State of Florida and operated under the name of Home Savings Association of Florida.

3. Overland Investments, Ltd., a partnership, in which F. Earl Crawford, Jr., (hereinafter called Crawford) is a partner, entered into a contract with the Housing Authority of the City of Asheville for the purchase of lots 16-B and 16-C redevelopment in civic redevelopment project number NCR-13 by agreement dated July 15, 1971 and recorded in Book 1044 at page 143 in the Office of the Register of Deeds of Buncombe County.

Appendix 4

4. In the early spring of 1972, Asheville Development Associates, a North Carolina partnership composed of F. Earl Crawford, Jr. and others, was formed to build the hotel which Overland Investments, Ltd. had proposed to build. The contract for sale of land for private development was assumed by Asheville Development Associates by agreement between the Housing Authority of the City of Asheville, Overland Investment, Ltd., and said Asheville Development Associates dated August 12, 1972 recorded in Deed Book 1067 at page 29 in the Office of the Register of Deeds of Buncombe County. The Housing Authority of the City of Asheville conveyed to Asheville Development Associates lots 16-B and 16-C in civic redevelopment project NCR-13 in the City of Asheville, Buncombe County,

North Carolina, by deed dated February 19, 1973, and recorded in Book 1076 at page 312 in the Office of the Register of Deeds of Buncombe County.

5. Crawford began looking for a permanent lender for the project who would, for a commitment fee, commit itself to make a long term mortgage loan on the project. He contacted Atlantic Mortgage and Investment Company (called Atlantic) in Winston-Salem, North Carolina, a mortgage brokerage company, which agreed to help find him a permanent lender and in early 1972, Wallace Associates, a New York Brokerage Company, put Atlantic and Crawford in contact with Home Federal.

6. Representatives of Atlantic met with Thomas Wohl, the President of Home Federal, at his offices in Hollywood,

Florida, with reference to a permanent loan for the proposed project. A meeting was then arranged in Asheville between Wohl, Crawford, J.P. Lauffer, the President of Atlantic and Michael Burroughs, another officer of Atlantic. At the meeting, Wohl inspected the proposed hotel site and negotiated some of the terms of the permanent loan commitment with Crawford.

7. Wohl prepared a permanent loan commitment letter from Home Federal to Atlantic dated April 14, 1972, and either mailed or delivered it in person to Atlantic for forwarding to its proposed borrower for approval and execution. Home Federal's commitment letter dated April 14, 1972, stated that its $6,000,000.00 commitment for a proposed 300 room convention hotel in Asheville, North

Carolina, as described in a feasibility report and was subject to certain conditions as set forth in said letter and in part provided:

A. The amount of the commitment for $6,000,000.00;

B. MAI appraisal was to be obtained indicating a value of the real estate not less than $8,000,000.00;

C. The proceeds of the permanent loan were to be disbursed upon full completion of the hotel project in accordance with the plans and specifications and upon the complete furnishing and equipping of the facility;

D. The interest rate would be 9 1/2% including one-tenth of one percent available for service to the mortgage company to be made for a period of twenty-four years and pursuant to all existing federal home loan bank regulations;

E. The loan was made subject to a management contract acceptable to Home Federal to be executed by the borrower and the Hyatt-House Hotel Corporation;

F. Home Federal was to have a valid first lien on the real property under the laws of the State of North Carolina with title insurance to be provided by a company acceptable to Home Federal;

G. Any and all expenses incident to the making of said loan must be paid by the borrower;

H. A commitment fee of $60,000.00 for one (1) year was to be paid and received by May 15, 1972, and the commitment could be extended for additional periods of time based on an additional fee of $30,000.00 for each six-months extension. Such additional fee to be paid 15 days prior to the expiration date of the prior commitment as long as the commitment remained in good standing;

I. A commitment would continue to be valid and effective, but would automatically terminate upon the association's failure to receive written notification from all applicable government authorities indicating that the completed project has been approved by them and that it can be operated and utilized in accordance with the assumptions made in the feasibility report

> or the adjudication of the borrower as bankrupt or insolvent by a court of competent jurisdiction or an order of such court, and if such adjudication or order remained in force for a period of 40 days.

8. Atlantic forwarded the April 14, 1972 commitment letter to Crawford in Asheville for the borrower's approval and execution. Crawford executed a copy of the commitment letter on behalf of the proposed borrower and delivered it to J. Michael Burroughs of Atlantic for forwarding to Home Federal together with a check for the $60,000.00 commitment fee and a cover letter addressed to Home Federal dated May 15, 1972 requesting certain changes in the commitment. Burroughs then mailed the cover letter requesting the said changes together with the executed copy of the commitment

letter and the commitment fee to Home Federal by letter dated May 24, 1972. Home Federal amended its April 14, 1972 commitment letter to comply with the changes requested in Crawford's letter of May 15, 1972. The changes being that Crawford was to execute a nondivestiture agreement satisfactory to Home Federal's counsel and Home Federal would return the commitment fees paid to it if it did not approve the MAI appraisal, the management contract or the plans for the construction of the hotel.

9. Home Federal objected to the proposed management contract of Hyatt because it required Home Federal to subordinate the first lien of the deed of trust which it had required under its commitment letter as security for its

loan to Hyatt House Corporation proposed management contract.

10. In October 1972, Crawford proposed Motor Inn Management, Inc., a North Carolina Corporation, as the management company for the hotel and by letter of November 13, 1972, Home Federal agreed to accept Motor Inn Management as the management company for the hotel and amended its April 14, 1972 commitment letter to that effect.

11. At the request of Crawford, Atlantic began looking for a construction lender for the proposed project for Asheville Development Associates in the fall of 1972. Chemical was approached by Cooper-Horowitz, a New York brokerage firm. Chemical met with Crawford, Michael Burroughs of Atlantic and a representative of Cooper-Horowitz. A

proposed construction loan commitment was submitted to Chemical's commercial committee on December 12, 1972, and Chemical issued a construction loan commitment to Asheville Development Associates on December 18, 1972.

12. On December 26, 1972, Asheville Development Associates entered into a management contract with Motor Inn Management, Inc. By letter of January 3, 1973, Atlantic delivered the Motor Inn Management letter agreement to Home Federal together with a copy of the Motor Inn Management contract. Home Federal approved the Motor Inn Management contract and accepted the said letter agreement by signing a copy of the January 3, 1973 letter from Atlantic. The management contract granted certain

termination rights to Landmark as owner and to Motor Inn Management, Inc. as manager.

13. Asheville Development Associates deeded lots 16-B and 16-C in civic redevelopment project NCR-13, above referred to in paragraph 4 to Landmark Hotel, Inc. (called Landmark) on April 13, 1973, and assigned all rights under the Motor Inn Management Contract to Landmark.

14. Home Federal learned of the commitment of the proposed construction lender by letter dated January 13, 1973, from Atlantic after the construction loan commitment had been issued. In compliance with one of the conditions of Home Federal's permanent loan commitment dated April 14, 1972, Landmark submitted a proposed MAI valuation report dated

December 4, 1972 placing an evaluation of $8,200,000.00 on the proposed project when completed. The opinion and report being based in part on anticipated income and expenses in the operation of the facility.

15. Negotiations were entered into between Landmark and Chemical in an effort to arrange for the closing of Home Federal's permanent loan and the paying off of Chemical's construction loan. Atlantic represented the Borrower, Landmark, during these negotiations.

16. Home Federal, by Wohl, executed an undated letter being Defendant's Exhibit 154 for identification purposes.

17. Prior to the closing of the construction loan, the Housing Authority of the City of Asheville and Chemical through Merritt and Harris, a New York

Engineering Firm, approved the building plans and specifications as required.

18. Chemical closed the construction loan to Landmark on April 13, 1973 in New York, New York. Those being present at the closing were: James Offut, John Ready, attorney for Chemical; Crawford, President of Landmark Hotel, Inc.; William E. Greene, Esquire, counsel for Landmark; Anthony Fiorella and Moriarty of Chicago Title Insurance Company. Home Federal was not represented or advised of the date for closing of the construction loan prior to the closing.

19. At the closing of the construction loan on April 13, 1973, the building loan mortgage note in the principal amount of $6,000,000.00 was delivered to Chemical. The maturity date for the building loan mortgage note was

September 14, 1974. Attached to the building loan mortgage note marked as Exhibit "A," was a first mortgage real estate note executed by Landmark and the guarantors in the amount of $6,000,000.00 which was also executed and delivered by Landmark and the named guarantors at the closing. The maturity date of the building loan mortgage note and the loan evidenced thereby was September 14, 1974. The first mortgage real estate note attached as Exhibit "A" to the building loan mortgage note provided that it was secured by a first mortgage or Deed of Trust of even date therewith from Landmark to Thomas W. Wharton, Trustee.

20. Landmark made and delivered to Chemical at the same said closing a Deed of Trust dated April 13, 1973, from Landmark Hotel, Inc. to Sydnor Thompson,

Trustee, which was secured by the building loan mortgage note also known as the construction loan Deed of Trust. The construction loan Deed of Trust is recorded in Book 812 at page 722 in the Office of the Register of Deeds of Buncombe County, North Carolina, and the permanent loan Deed of Trust is recorded in Book 814 [sic] at page 725 in the Office of the Register of Deeds of Buncombe County.

21. At the closing of the construction loan on April 13, 1973, the management agreement between Asheville Development Associates and Motor Inn Management, Inc. dated December 26, 1972 and all the rights of Landmark thereunder were conditionally assigned to Chemical without the consent or knowledge of Home Federal.

22. Chemical advanced a total of $150,000.00 of the construction loan proceeds to Landmark; $90,000.00 of which was to permit Landmark to extend the permanent loan commitment through October 14, 1974; and $60,000.00 to reimburse Landmark for the fee it had initially paid for the permanent loan commitment.

23. On April 13, 1973, and subsequent to the closing of the construction loan, Chicago Title Insurance Company issued policy number 34-005-07-03893 dated May 21, 1973 to Chemical as the insured insuring the Deed of Trust dated April 13, 1973 from Landmark Hotel, Inc. to Sydnor Thompson, Trustee for Chemical Realty Corporation, securing the note in the sum of $6,000,000.00 and filed in Deed Book 812

at page 693 in the Office of the Register of Deeds of Buncombe County.

24. Landmark entered into a construction contract for the construction of the hotel with D.C. Turner Construction Company prior to the closing of the construction loan.

25. Chemical made monthly advances to Landmark under its building and loan agreement in the total amount of $4,861,274.38. The first advance being made on April 13, 1973 and the last advance being made on September 17, 1974. An additional $5,975.05 was advanced by Chemical on October 10, 1974, and charged to the loan bringing the total amount advanced to Landmark or on its behalf on the construction loan to $4,867,249.43.

26. During the course of construction, Chemical's Engineers,

Merritt and Harris, inspected the construction on a monthly basis and certified to Chemical a percentage of completion each month.

27. In November, 1973, Atlantic notified Home Federal that Landmark had entered into a ground lease with Orbital Industries, Inc., and mailed to Home Federal a copy of the ground lease between Landmark and Orbital dated April 13, 1973, and a copy of a management agreement between Orbital and Development Consultants, Inc. dated April 13, 1973. A memorandum of this ground lease entitled "Memorandum of Lease" dated April 13, 1973 was recorded on December 28, 1973, in Book 1092 at page 655 in the Office of the Register of Deeds for Buncombe County. Atlantic requested that Home Federal approve the agreements with

Orbital by letters dated November 2, 1973 and January 17, 1974. Atlantic's January 17, 1974 letter stated that Chemical had requested this approval by Home Federal because paragraph 20 of the permanent loan Deed of Trust called for Home Federal's approval of any lease or sale of the security property. Home Federal advised Atlantic that it would not review or approve the ground lease or the management agreement until the closing of its permanent loan. The management agreement with the Development Consultants, Inc. for the hotel had not been approved by Motor Inn Management, Inc. Crawford was the principal party in Development Consultants, Inc.

28. By letter dated March 20, 1974, Landmark directed Motor Inn Management, Inc. to stop the performance of all

further work and responsibilities under the management contract. Landmark instituted a civil action against Motor Inn Management, Inc. on April 5, 1974 for damages as for breach of the management contract between the parties.

29. On May 15, 1974, Landmark recorded a Deed of Trust to J. William Russell, Trustee on the hotel property, dated April 13, 1973, securing a demand note for $250,000.00, said Deed of Trust being recorded in Deed Book 829 at page 641 in the Office of the Register of Deeds of Buncombe County, North Carolina. The Deed of Trust had not been cancelled on October 14, 1974.

30. On June 24, 1974, representatives of Chemical met with Crawford and stated that the management contract with Motor Inn Management, Inc. was specific-

ally called for by the permanent loan commitment and that the permanent loan commitment was in jeopardy because of the difficulties with the management contract. Crawford expressed a desire to have in-house management under his manager, David Botball.

31. Wohl of Home Federal visited the construction site in the last week of June 1974 and found that Landmark had terminated Motor Inn Management as the management company for the hotel. Wohl immediately wrote Atlantic, Chemical and Crawford by letter dated June 28, 1974 advising them of his concerns with the management arrangements of the lease agreement with Orbital and the litigation pending between Landmark and Motor Inn Management, Inc. Representatives of Chemical met with Crawford and Wohl in

Hollywood, Florida, on July 26, 1974 at which time Wohl again expressed his concerns with reference to the management contracts, Orbital and pending litigation. Crawford sought approval from Wohl for in-house management under David Botball, the general manager of the hotel, and was asked by Wohl to submit a brochure outlining his proposal; however, no outline was forth coming and David Botball left the employment of Landmark in September, 1974.

32. Following July, 1974, no further request was made of Home Federal to accept a substitute management company for Motor Inn Management, Inc.

33. By letter dated July 23, 1974, Motor Inn Management, Inc. notified Landmark, Chemical and Home Federal that Landmark had breached its management

contract and that Motor Inn Management's obligations were terminated because of the management contract having been breached by Landmark Hotel as set forth in said letter.

34. Landmark continued to prosecute its action against Motor Inn Management, Inc. in 74-CVS-1597, Buncombe County, and Motor Inn Management, Inc. filed an answer and counterclaim against Landmark and crossclaim against Chemical and Home Federal therein for damages and a determination of its obligations to Chemical and Home Federal under its management contract with Landmark and its letters to Chemical and Home Federal.

35. On September 25, 1974, the Public Safety Department of the City of Asheville issued a final certificate of occupancy and compliance for the hotel.

36. On October 10, 1974, Merritt and Harris issued its certificate, certifying the hotel was substantially complete in accordance with the approved plans and specifications as did Gene Whittington, architect for Landmark.

37. By letter dated October 3, 1974, Crawford advised Atlantic, Chemical and Home Federal that the construction of the hotel was complete and that Landmark was ready to close the permanent loan and requested that Home Federal come to Asheville and inspect the property and the papers which were being prepared pursuant to closing the permanent loan. Crawford's letter was received by Home Federal on October 8, 1974.

38. Chemical notified Home Federal by letter and a confirming telegram dated October 7, 1974, that they would be

present at Home Federal's Hollywood offices at 10:30 a.m., on October 11, 1974, to make a tender for the purpose of closing the permanent loan. Crawford and Chemical were notified that Home Federal had received nothing with regard to a management company to replace Motor Inn Management Inc. in order to satisfy the management phase of the permanent loan commitment.

39. A certificate of completion for the hotel was not issued upon request during October, 1974, and was not issued until November, 1976. On October 10, 1974, Landmark closed the hotel and made no further efforts to close the permanent loan. The hotel remained closed at all times through October 14, 1974, and did not reopen for business until 1977 under

new owners. On October 11, 1974, Chemical sent a telegram to Home Federal advising that Chemical's representatives would arrive at 2:00 p.m. on October 14, 1974, to tender documents under Home Federal's permanent loan commitment.

40. As of October 14, 1974, the title insurance issued with respect to the hotel was policy number 34-005-02-03891 issued by Chicago Title Insurance Company to Chemical as the insured. The title insurance policy provided that only the amounts disbursed under the construction loan were insured with no reference to the permanent loan being insured. Landmark did not request an extension of its permanent loan commitment in compliance with the terms of said commitment or did Chemical

request an extension of the permanent loan commitment and neither Landmark or Chemical made tender the proper fee for such an extension of the permanent loan commitment.

41. The real property and the hotel which was located on the property was on October 14, 1974, subject to mechanics and materialmens liens; liens for certain fixtures and equipment, a Deed of Trust from Landmark Hotel, Inc. to William Russell, Trustee for bearer securing $250,000.00 recorded in Deed of Trust Book 829 page 641.

BASED UPON THE FOREGOING Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW:

1. Home Federal issued a permanent loan commitment to Landmark by letter of

April 14, 1972, which was amended by three subsequent letters: one (1) dated May 24, 1972, one (1) dated November 13, 1973 and another dated March 28, 1973. Said letters dated April 14, 1972, May 24, 1972, November 13, 1972 and March 28, 1973 are all the documents comprising Home Federal's permanent loan commitment and contain all terms and conditions thereof.

2. Chemical issued its construction loan commitment to Landmark by letter dated December 18, 1972, and closed its construction loan with Landmark on April 13, 1973.

3. The permanent loan commitment was an agreement between Home Federal and Landmark entered into without reference to Chemical or its construction loan before Chemical issued its construction

loan commitment and amended for the last time before Chemical closed its construction loan. Chemical was not a party to the permanent loan commitment.

4. On October 14, 1974, no enforceable management contract was in effect for the hotel which had been approved by Home Federal as required by previously executed documents. On October 14, 1974, neither Landmark or Chemical could deliver a permanent loan Deed of Trust evidencing a valid first lien on the hotel real property to secure a $6,000,000.00 loan evidenced by the first mortgage real estate note.

5. On October 14, 1974, Landmark had closed the hotel, was insolvent and without sufficient funds to operate the hotel.

6. That the building loan mortgage note and construction loan Deed of Trust became due and payable on September 14, 1974 and at all times subsequent thereto was in default and was in default on October 14, 1974 by the terms upon its face.

7. No extension of the permanent loan commitment had been made or had one been requested under the terms and conditions of the permanent loan commitment on October 14, 1974.

8. On October 14, 1974, Landmark had abandoned the hotel project and tendered the hotel to Chemical.

BASED UPON THE FOREGOING Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Judgment be entered for the Defendant, Home Federal Savings and Loan

Association of Hollywood, Florida, and that the Plaintiff have and recover nothing of the Defendant.

2. That the costs of this action be taxed against the Plaintiff, Chemical Realty Corporation.

This the 29th day of June, 1982.

/s/ C. Walter Allen
C. WALTER ALLEN
Resident Superior Court Judge
Twenty-Eighth Judicial District
Buncombe County, North Carolina

Appendix 34

NO. 8228SC1265

NORTH CAROLINA COURT OF APPEALS

Filed 6 December 1983

CHEMICAL REALTY CORP- ORATION	)	
v.	)	
HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD	)	Buncombe County No: 76CVS2491

Appeal by plaintiff from Allen, Judge. Judgment entered 29 June 1982 in Buncombe County Superior Court. Heard in the Court of Appeals 24 October 1983.

Plaintiff sued defendant to recover damages for an alleged breach of contract. In its complaint, plaintiff claimed that the defendant had agreed to a "takeout" or purchase of the plaintiff's construction loan to Landmark Hotel, Inc. (hereinafter, Landmark).

Plaintiff alleged that it had made a construction loan to Landmark in reliance on defendant's promise to provide the long-term financing of the Landmark hotel. Defendant refused to make the long-term loan to Landmark after plaintiff had advanced funds under the construction loan.

Plaintiff alleged that defendant had a contractual duty to fund the long-term loan for two reasons. First, defendant had issued a permanent loan commitment to Landmark in which defendant promised, under certain terms, to provide long-term financing for Landmark's hotel. Plaintiff alleged that it was a third party beneficiary of defendant's permanent loan commitment to Landmark. Second, defendant sent a letter to

plaintiff agreeing to purchase the construction loan note and accept an assignment of the deed of trust held by plaintiff as long as there had been no default of the terms of the permanent loan commitment. Plaintiff alleged that this letter created a direct contractual duty running from defendant to plaintiff. Plaintiff's amended complaint asked for $5,694,951.56 in damages.

In its answer, defendant denied that plaintiff was a third party beneficiary of the permanent loan commitment and denied that its letter to plaintiff formed a contract. Defendant also alleged that it had no obligation under the permanent loan commitment since the terms of the commitment had not been fulfilled.

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The stipulations and evidence at trial tended to show the following. Landmark's predecessor-in-interest had acquired some land in Asheville on which it planned to build a hotel. It entered into negotiations with defendant for a long-term mortgage loan to finance the hotel. On 14 April 1972 defendant issued a permanent loan commitment letter which Landmark's predecessor-in-interest executed and returned along with a $60,000.00 commitment fee. The commitment letter was later modified to substitute Landmark as the borrower, and in other minor aspects.

The commitment letter included the following pertinent terms. Defendant committed itself to loan $6,000,000.00 for the proposed hotel, as described in a feasibility report, to be disbursed upon

completion of the hotel. The loan was conditioned on receipt of an appraisal of not less than $8,000,000.00 for the real estate to be encumbered. The loan was "subject to an acceptable management contract to be executed by the borrower and the Hyatt House Hotel Corp." It was also subject to defendant being placed in the position of a mortgagee holding a valid first lien, with title insurance to be provided by a company acceptable to defendant. Payment of the $60,000.00 commitment fee by 15 May 1972 kept the commitment in effect for one year from the date of the 14 April 1972 commitment letter. Six-month extensions of the commitment could be obtained by payment of an additional $30,000.00 fee for each extension; however, any extension fee had to be paid fifteen days

prior to the expiration of the outstanding commitment. The commitment was to automatically terminate upon, among other things, the failure of defendant "to receive written certification from all applicable Government Authorities indicating that the completed project has been approved by them ...."

Landmark's proposed contract with Hyatt House Hotel Corp. was rejected by defendant because Hyatt wanted defendant to subordinate its interests as first mortgagee to Hyatt. Landmark then proposed Motor Inn Management, Inc. (hereinafter, MIM) and on 13 November 1972 defendant agreed to accept MIM as the management company instead of Hyatt.

Also in November, 1972, a broker approached plaintiff about becoming the construction lender for the Landmark

project. Plaintiff reviewed the permanent loan commitment of defendant and issued a construction loan commitment to Landmark on the condition that Landmark, plaintiff, and defendant would enter into a tripartite buy-sell agreement whereby plaintiff's construction loan would be repaid from the defendant's permanent loan. Not until after the construction loan commitment had been issued in December of 1972 did plaintiff enter into negotiations with defendant for this proposed takeout agreement. Defendant refused to enter the tripartite agreement proposed by plaintiff. Defendant felt that the proposed agreement would have forced it to take out the construction loan "come hell or high water." The plaintiff modified its construction loan commitment on 7

February 1973 to eliminate the requirement of a tripartite agreement.

Plaintiff and defendant continued to discuss the arrangements by which defendant would become Landmark's permanent lender. Plaintiff and an intermediary broker worked out terms that were acceptable to defendant. These terms were set forth in an undated letter executed by defendant and delivered to the intermediary in early April, 1973. The intermediary passed the undated letter on to plaintiff. The letter stated in part that,

> This is to confirm that the Commitment and amendments, copies of which are attached hereto, is in full force and effect as of the date hereof, that there have been no modifications thereof and that no modifications shall be made without your consent and pursuant to such commitment. This is to confirm that:

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1. We have received, in full satisfaction of the terms of paragraph numbered 1 of the Commitment, an MAI appraisal indicating a value in the Premises, upon completion of the improvements of at least $8,000,000;

2. We have reviewed the Chicago Title Insurance Company commitment for Title Insurance No. 73-U-00006 attached hereto as marked up with deletions crossed through and additions noted thereon; Chicago Title Insurance Company is acceptable to us as the title insurer and policy to be issued to us pursuant to paragraph 5 of our commitment ... will be satisfactory and acceptable by us.

....

4. We have found acceptable and approved the Management Contract dated December 26, 1972 between Asheville Development Associates and Motor Inn Management, Inc. as assigned to the Borrower satisfying the terms of paragraph numbered 4 of the Commitment;

5. We have received the $60,000 commitment fee referred to in paragraph numbered 8 on the Commitment and agree that we will accept from you the additional $90,000 commitment fee at the closing of the construction loan

whereupon the Commitment will be automatically extended to October 14, 1974;

6. The issuance of (a) the Certificate of Completion referred to in Section 307 of the Contract for Sale of Land for Private Redevelopment by and between Overland Investments, Ltd. and Housing Authority of The City of Asheville and (b) a Certificate of Occupancy, will satisfy the conditions of paragraph numbered 9 (a) of the Commitment;

....

10. We have approved, in all respects the First Mortgage Real Estate Note and Deed of Trust, copies of which are attached hereto, and agree that at the appropriate time, as provided in the Commitment, we will purchase said First Real Estate Note from you, without recourse, and accept the assignment of said Deed of Trust provided however that the loan is not in default under the terms of our Commitment or our loan documents. We have also approved the form of the assignment of the Deed of Trust to be made by you to us, a copy of which is attached hereto.

11. We have reviewed the Construction Note and Construction Deed of Trust attached hereto including the language incorporating

> therein the First Mortgage Real Estate Note and Deed of Trust referred to in 10 above. We understand that the Guaranty and Endorsement on the Construction Note will be executed at the closing of your construction loan with Landmark Hotel, Inc. and will survive an assignment of your note to us. We understand that the terms and provisions of the First Mortgage Real Estate Note and Deed of Trust referred to in 10 above will automatically become operative upon an assignment of the Deed of Trust and Note to us from you.

Defendant extended its original commitment to 15 April 1973 "for purposes of facilitating the closing of the construction loan." Plaintiff closed the construction loan to Landmark on 13 April 1973. No representative of defendant was present at the construction loan closing. Plaintiff disbursed $30,000.00 directly to defendant the same day to obtain a six-month extension of the permanent loan commitment. It disbursed another

$60,000.00 a few days later to extend the permanent loan commitment through 14 October 1974.

At the closing, Landmark executed a building loan mortgage note in the principal amount of $6,000,000.00 and delivered it to plaintiff. Attached to the building loan mortgage note as Exhibit A was a first mortgage real estate note in the principal amount of $6,000,000.00, also executed by Landmark and delivered to plaintiff. The building loan mortgage note provided that if it was purchased by defendants, its terms would be superseded by those of the first mortgage real estate note.

The building loan mortgage note was secured by a construction loan deed of trust executed by Landmark on the same day. Plaintiff was the beneficiary and

Sydnor Thompson served as trustee. Attached to the construction loan deed of trust as Exhibit B was a permanent loan deed of trust executed by Landmark. The trustee was Thomas Wharton, who represented the broker acting as an intermediary between plaintiff and defendant. The construction loan deed of trust provided that upon the purchase of the building loan mortgage note and the assignment of the construction loan deed of trust to defendant, the terms of the permanent loan deed of trust would supersede those of the construction loan deed of trust. The construction loan deed of trust, with the permanent loan deed of trust attached as Exhibit B, was recorded in the Buncombe County Office of the Register of Deeds.

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Plaintiff advanced $4,867,249.43 to Landmark from 13 April 1973 to 10 October 1974 under the construction loan. Landmark used the funds to build the hotel and prepare it for doing business. The construction was certified as substantially complete on 10 October 1974.

During construction of the hotel, several events occurred pertinent to the permanent loan commitment. The management contract with MIM appeared to be at an impasse, and MIM and Landmark sued each other for breach of that contract. Landmark ordered MIM to cease performance of its pre-opening duties in March, 1974. MIM notified all concerned parties in July of 1974 that it deemed its obligations to plaintiff and defendant terminated due to Landmark's breach of

the management contract. Defendant informed the plaintiff that it was worried about the collapse of the management contract and about a lease agreement between Landmark and Orbital Industries, Inc. Neither Landmark nor plaintiff proposed a substitute management company acceptable to defendant. The Housing Authority of Asheville refused to issue a certificate of completion, which had been requested, for the hotel in October, 1974.

Landmark was unable to pay all the bills for the hotel on 9 October 1974, and on that day, a representative of Landmark tendered the hotel keys to a representative of plaintiff, who refused to accept them. On 10 October 1974 Landmark closed the hotel due to a lack of operating funds.

Meanwhile, plaintiff informed the intermediary broker, by a letter dated 3 October 1974, that it and Landmark were ready to close the permanent loan with defendant. Plaintiff sent a telegram and a letter, both dated 7 October 1974, to defendant stating that it would tender the first real estate note and deed of trust on 11 October 1974 to defendant. On 11 October 1974 plaintiff sent defendant a telegram giving notice that plaintiff would tender the Landmark loan on 14 October 1974.

On 14 October 1974 representatives of plaintiff arrived at defendant's hometown office prepared to close the permanent loan to Landmark. Defendant refused plaintiff's tender of the construction loan note and deed of trust. Defendant indicated that the terms of the

permanent loan commitment had not been met and that the economy was too uncertain for it to finance as risky a venture as the hotel. Plaintiff then asked for an extension of the permanent loan commitment. Defendant refused this request.

Landmark filed a voluntary petition in bankruptcy on 18 November 1974. On 11 February 1976 plaintiff received permission to foreclose its deed of trust. Plaintiff held a public foreclosure sale three months later and was the successful bidder at $3,000,000.00. Plaintiff subsequently sold the property to its wholly-owned subsidiary, which in turn sold the hotel to Vector Hospitality Associates.

This action was filed on 20 December 1976 by plaintiff. The trial court denied

defendant's motion to dismiss for lack of jurisdiction. The trial court's order was upheld on appeal.

The case was then tried before the trial court sitting without a jury. After making findings of fact and conclusions of law, the trial court entered judgment for the defendant. Plaintiff appealed.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Sydnor Thompson, Fred T. Lowrance, and Sally Nan Barber; Herbert Hyde; Van Winkle, Buck, Wall, Starnes & Davis, by Larry McDevitt, for plaintiff.

McCoy, Weaver, Wiggins, Cleveland & Raper, by John E. Raper, Jr. and Richard M. Wiggins, and Redmond, Stevens, Loftin

& Currie, by John S. Stevens and Thomas R. West, for defendant.

WELLS, Judge.

Plaintiff first contends that the trial court erred in failing to find and conclude that a contract existed between plaintiff and defendant. Plaintiff also contends that the trial court should have found and concluded that it was a third party beneficiary of defendant's permanent loan commitment. We hold that the trial court did not adequately address these issues.[1]

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[1] In Chemical Realty Corp. v. Home Federal Savings & Loan Association of Hollywood, 40 N.C. App. 675, 253 S.E.2d 621, disc. rev. denied and app. dismissed, 297 N.C. 612, 257 S.E.2d 435 (1979), app. dismissed, 444 U.S. 1061, 100 S.Ct. 1000, 62 L.Ed.2d 744 (1980), we

(continued on next page)

G.S. §1A-1, Rule 52(a)(1) of the Rules of Civil Procedure requires a trial judge hearing a case without a jury to make findings of fact and conclusions of law. To comport with Rule 52(a)(1), the trial court must make "a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." Quick v. Quick, 305 N.C. 446,

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upheld the trial court findings that a contract existed between Chemical and Landmark. These findings were made solely to establish jurisdiction over the defendant, do not go to the merits of this case or determine the contractual rights of plaintiff and defendant, and therefore do not constitute the law of the case on the respective contractual rights or obligations of plaintiff and defendant.

290 S.E.2d 653 (1982) (citation omitted). Rule 52(a)(1) does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. Id. See also Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

Although the letter written by Home Federal to Chemical appears from [sic] an agreement supported by consideration by Home Federal to purchase Chemical's construction loan upon compliance with certain conditions precedent, the trial court's only finding of fact with respect to the letter was that "Home Federal, by Wohl, executed an undated letter being

Defendant's Exhibit 154 for identification purposes." This finding is an evidentiary fact, not an ultimate fact. The trial court failed to make any finding of fact regarding whether defendant owed any contractual duty to plaintiff. Such findings are necessary to a valid judgment in this action. As the North Carolina Supreme Court has stated,

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly

> exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 709, 268 S.E.2d 185 (1980).

Although the trial court's order contains more than forty-one separate findings of fact,[2] the evidence, stipulations, and pleadings in the instant case present questions of fact which were ignored in those findings, but which must be resolved before judgment can be entered. On remand, the following issues should be resolved by proper findings and conclusions.

(1) Was there a promise by defendant, supported by consideration, to

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[2]We note that some of the trial court's purported conclusions of law are only additional findings of fact.

plaintiff to purchase plaintiff's construction loan?

(2) If defendant made no promise, did defendant's actions provide the basis for plaintiff to become a Creditor beneficiary of defendant's permanent loan commitment?

(3) If plaintiff contracted with defendant, or had third party beneficiary status, what were the conditions precedent and material terms that had to be complied with before defendant's duty to plaintiff to perform arose?

(4) Were those terms and conditions substantially complied with?

(5) If Landmark and/or plaintiff had not fulfilled the conditions precedent and material terms

on 14 October 1974, did plaintiff timely request defendant to extend the permanent loan commitment beyond 14 October 1974?

(6) If plaintiff did make a timely request to extend the permanent loan commitment, to what extent did plaintiff incur foreseeable and ascertainable damages by defendant's refusal to extend?

Defendant contends that even if the trial court failed to make all the necessary findings arising under the evidence, the findings it made adverse to plaintiff and supported by the evidence are sufficient to sustain the trial court's conclusions and judgment. We cannot agree. The trial court's findings having failed to address crucial aspects of the rights and obligations of the parties arising upon the evidence, we can

make no assumptions as to what the result will be when the evidence in the case is properly sifted, addressed, and treated at the trial level.

The parties to this appeal have submitted extensive briefs; plaintiff has brought forward a number of exceptions we have not addressed; but we perceive that it would be untimely and unproductive for us to deal with plaintiff's other exceptions because of the obvious need for the heart of this case to be reconsidered at the trial level.

Because we perceive there are no questions raised in the appeal as to admission of evidence or credibility of witnesses, we conclude that it is unnecessary to order a new trial, and that the case may be properly considered on remand on the existing record.

For the reasons stated, the judgment of the trial court must be reversed and the case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge VAUGHN and Judge JOHNSON concur.

Appendix 61

NO. 8228SC1265

NORTH CAROLINA COURT OF APPEALS
****

CHEMICAL REALTY CORP-
ORATION, Plaintiff

v.

HOME FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF HOLLYWOOD,
Defendant

County: Buncombe
Number: 76CVS2491

(Filed February 7,
1984 12:47 p.m.)

****

O R D E R

The following Order was entered:

"The petition filed in this cause on the 11th day of January, 1984, and designated Petition for Rehearing is denied.

By order of the Court this 7th day of February, 1984."

The above order is therefore certified to the Clerk of the Superior Court in Buncombe County, North Carolina.

Witness my hand and official seal this the 7th day of February, 1984.

/s/ Francis E. Dail
Clerk of the Court of Appeals

Appendix 63

No. 91P84 TWENTY-EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

CHEMICAL REALTY CORPORATION	)	ORDER DENYING PETITION FOR DISCRETIONARY REVIEW (8228SC1265)
v.	)	
HOME FEDERAL SAVINGS and LOAN ASSOCIATION OF HOLLYWOOD	)	

****

Upon consideration of the Plaintiff's petition filed in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

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"Denied by order of the Court in conference, this the 3rd day of April, 1984.

s/Frye, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of April, 1984.

/s/ J. Gregory Wallace
J. GREGORY WALLACE
Clerk of the Supreme Court

Appendix 65

NO. 8228SC1265

NORTH CAROLINA COURT OF APPEALS
****

CHEMICAL REALTY CORP-
ORATION, Plaintiff

v.

County: Buncombe
No: 76CVS2491

HOME FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF HOLLYWOOD,
Defendant

****

Petition for Discretionary Review to review the decision of the Court of Appeals filed on December 6, 1983 was denied by order of the North Carolina Supreme Court on the 3rd day of April, 1984, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Buncombe County that the North Carolina Supreme Court has

denied the Petition for Discretionary Review filed by petitioner in this cause.

Witness my hand and official seal this the 9th day of April, 1984.

/s/ Francis E. Dail
Clerk of the Court of Appeals

/s/ Jeanne Stakeman
by Deputy Clerk

APPENDIX

LIST OF PARENT CORPORATION, AFFILIATED CORPORATIONS, AND SUBSIDIARY CORPORATIONS PURSUANT TO RULE 28.1

Parent Corporation:

Chemical New York Corporation

Affiliated Corporations:

Albuquerque Capital Management, Inc.
Alexander, Scriver and Associates, Inc.
Brown & Company Securities Corporation
Chemgraphics Systems, Inc.
Chemical Bank
Chemical Business Credit Corporation
Chemical New York - N.V.
Chemical First State Corporation
Chemical Florida Banks, Inc.
Chemical Futures, Inc.
Chemical Investment Advisers, Inc.
Chemical Mortgage Company
Chemical New Jersey Corporation
Chemical New York Corporation-U.S.A.
Chemical New York Southwest, Inc.
Chemical Trust Company of Florida, N.A.
Dommerich Factors, Inc.
Favia, Hill & Associates, Inc.
Investment and Capital Management Corporation
Pronto, Inc.
Sunamerica Corporation

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The Portfolio Group, Inc.
Van Deventer & Hoch Inc.
Florida National Banks of Florida, Inc.
Gulf Stream Aero Space
S.W.I.F.T.

. Subsidiary Corporations:

There are seven (7) wholly owned subsidiaries which the petitioner is not required to list under Rule 28.1.